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The Bank of New York Mellon fka The Bank of New
York, as Trustee for the Certificate Holders CWALT,
Inc. Alternative Loan Trust 2006-OC8 Mortgage
Pass-Through Certificates, Series 2006-OC8

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

The Bank of New York Mellon fka The
Bank of New York, as Trustee for the
Certificate Holders CWALT, Inc.
Alternative Loan Trust 2006-OC8
Mortgage Pass-Through Certificates,
Series 2006-OC8,

Plaintiff,

vs.

Marguerite DeSelms, individually, and as
Trustee of The Circle Road Revocable
Living Trust Dated November 11, 2010;
Alan David Tikal as Trustee of the KATN
Revocable Living Trust; and CAA, Inc., a
Nevada corporation,

Defendants.

Case No.: 5:18-cv-01044

**PLAINTIFF'S OPPOSITION TO
DEFENDANT MARGUERITE
DESELMS'S MOTION TO DISMISS
THE COMPLAINT**

1 Plaintiff The Bank of New York Mellon fka The Bank of New York, as Trustee
2 for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OC8 Mortgage
3 Pass-Through Certificates, Series 2006-OC8, (“BONY”) hereby opposes the Motion
4 to Dismiss of Defendant Marguerite DeSelms, individually, and as Trustee of The
5 Circle Road Revocable Living Trust Dated November 11, 2010 (“collectively,
6 “DeSelms”).

7 **INTRODUCTION**

8 In an attempt to defraud her lender from paying hundreds of thousands of
9 dollars owed, DeSelms fraudulently recorded three documents purporting to
10 extinguish the subject deed of trust. With the help of a now-convicted felon,
11 defendant Alan David Tikal (“Tikal”), DeSelms recorded a grant deed transferring title
12 from DeSelms to the Circle Road Trust. Further, DeSelms recorded a deed of trust in
13 favor of Tikal, and thereafter recorded a Substitution of Trustee and Full
14 Reconveyance purporting to nominate the KATN Trust as trustee under the deed of
15 trust and reconvey all interest therein to the Circle Road Trust. In a further attempt to
16 defraud her creditors, DeSelms filed multiple bankruptcy petitions, all of which were
17 dismissed for failure to make plan payments.

18 BONY filed a lawsuit to cancel and reform the phony documents DeSelms
19 recorded. BONY’s Complaint alleges that DeSelms knowingly caused a
20 reconveyance to be recorded which has interfered with BONY’s security interest in
21 the property, and requests that the Court adjudge the reconveyance as void and
22 cancelled. The Complaint adequately and thoroughly pleads all of the requisite
23 elements for a cancellation of written instrument claim, a reformation of written
24 instrument claim, and a declaratory relief determination.

25 DeSelms’s Motion to Dismiss (“MTD”) is without basis and fails to set forth
26 any legitimate challenge to the allegations in the Complaint. DeSelms wrongly, and
27 without an iota of evidence, argues that BONY does not have standing to bring this
28 instant lawsuit. However, the beneficial interest in the subject deed of trust was

1 assigned to BONY from the original lender (“BONY Assignment”), and the BONY
 2 Assignment was recorded with the San Bernardino County Recorder’s office. The
 3 deed of trust has not been subsequently transferred and BONY is currently the holder
 4 of the promissory note and the beneficiary of the subject deed of trust. The Complaint
 5 and the judicially noticed documents establish that BONY was assigned all of the
 6 beneficial interest in the subject deed of trust, and thus, has standing to pursue this
 7 action.

8 As demonstrated more fully herein below, DeSelms’s MTD should be denied.

9 **STANDARD OF REVIEW**

10 **Subject Matter Jurisdiction**

11 Pursuant to Rule 12(b)(1), a party may seek dismissal of an action for lack of
 12 subject matter jurisdiction “either on the face of the pleadings or by presenting
 13 extrinsic evidence.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th
 14 Cir. 2003). Where the party asserts a facial challenge, the court limits its inquiry to
 15 the allegations set forth in the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d
 16 1035, 1039 (9th Cir. 2004). “If the challenge to jurisdiction is a facial attack ... the
 17 plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6)
 18 motion is made.” *San Luis & Delta-Mendota Water Auth. v. U.S. Dep’t of the Interior*,
 19 905 F. Supp.2d 1158, 1157 (E.D. Cal. 2012) (internal citation and quotation omitted).
 20 If a court elects to resolve a fact-based Rule 12(b)(1) motion without an evidentiary
 21 hearing, it must accept the factual allegations of the complaint as true. *McLachlan v.*
 22 *Bell*, 261 F.3d 908, 909 (9th Cir. 2001).

23 **Failure to State a Claim**

24 When a court reviews a complaint under Rule 12(b)(6), all of the complaint’s
 25 material allegations of fact are taken as true, and the facts are construed in the light
 26 most favorable to the non-moving party. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d
 27 916, 919 (9th Cir. 2008); *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1999).
 28 Inquiry into the adequacy of the evidence is improper. *Enesco Corp. v. Price/Costco*,

1 *Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). A court may not dismiss a complaint
 2 “unless it appears beyond doubt that the plaintiff can prove no set of facts in support
 3 of his claims which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46
 4 (1957).

5 ARGUMENT

6 **I. BONY HAS PRESENTED COGNIZABLE FACTS ESTABLISHING ITS** 7 **STANDING TO BRING THIS ACTION**

8 DeSelms seeks dismissal of BONY’s Complaint alleging that BONY does not
 9 have standing to bring an action against her, as BONY is not the “lawful holder or
 10 owner of the note and deed of trust...” (MTD pp.3-4 ll. 23-28, 4-8). In support,
 11 DeSelms relies exclusively on her own self-serving declaration, which she
 12 erroneously contends establishes that BONY does not have standing. DeSelms offers
 13 no proof other than her declaration. The Court, however, can disregard Plaintiff’s
 14 self-serving statements because the recorded documents demonstrate that BONY in
 15 fact is the beneficial owner of the note and deed of trust.

16 **A. Both the Complaint and the Recorded Documents Establish that** 17 **BONY is the Rightful Owner**

18 The Complaint and the recorded documents establish the following chain of
 19 title on the deed of trust:

- 20 • On or about July 31, 2006, Bondcorp Realty Service, Inc. (“Bondcorp”)
 - 21 as lender, with Mortgage Electronic Registration Systems, Inc.
 - 22 (“MERS”) as the nominee beneficiary for the lender, and DeSelms as
 - 23 borrower, entered into a mortgage loan for the property, whereby
 - 24 Bondcorp loaned the principal sum of \$340,000 to DeSelms. In
 - 25 connection with the loan, DeSelms executed a promissory note in favor
 - 26 of Bondcorp. *See* BONY’s Request for Judicial Notice (“RJN”) Ex. A.
- 27 • A deed of trust securing the promissory note in favor of Bondcorp and
- 28 MERS was recorded with the San Bernardino County Recorder on

1 August 14, 2006 as document number 2006-0552110 (“DOT”). *See* RJN
2 Ex. B

- 3 • On November 17, 2010, DeSelms fraudulently recorded three documents
4 purporting to extinguish the DOT: (1) a grant deed transferring title from
5 DeSelms to the Circle Road Trust; (2) a deed of trust in favor of Tikal,
6 trustee of the KAN Trust, as beneficiary; (3) Substitution of Trustee and
7 Full Reconveyance purporting to nominate the KATN Trust as trustee
8 under the DOT and reconvey all interest therein to the Circle Road Trust.
- 9 • On September 14, 2011, all beneficial interest in the DOT was assigned
10 to BONY (the “BONY Assignment”). The BONY Assignment was
11 recorded with the San Bernardino County Recorder on October 7, 2011
12 as document number 2011-0421288. *See* RJN Ex. C.
- 13 • The DOT has not been subsequently transferred and BONY is currently
14 the holder of the Promissory Note and beneficiary of the DOT.

15 DeSelms’s declaration offers only conclusions and not facts that would be
16 admissible evidence. A court can disregard a self-serving declaration that states only
17 conclusions. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1059 n. 5 (9th
18 Cir. 1997) (holding that the district court properly disregarded the declaration that
19 included facts beyond the declarant’s personal knowledge and did not indicate how
20 she knew the facts to be true).

21 As such, the Complaint alleges, and the recorded documents establish that
22 BONY has all beneficial interest in the Promissory Note and DOT, and thus has
23 standing to bring this action.

24 **B. The Lawsuits Do Not Establish Lack of Standing**

25 In her MTD, DeSelms contends that two lawsuits preclude BONY from
26 bringing the instant action. She is wrong.

27 The first lawsuit filed in 2012 (*Marguerite DeSelms v. Capital Management*
28 *Services, LP* (Case No. 12-8765) is between DeSelms and a third party. BONY is not

a named defendant and is not a party to the settlement agreement between DeSelms and Capital Management Services. The lawsuit related to unsubstantiated allegations of violations of Federal Debt Collection Practices Act, among other consumer-related violations. Once again, in the MTD and her declaration, DeSelms inaccurately argues that the settlement agreement reached in the 2012 lawsuit binds counsel from ever suing her again. This is nonsensical. The settlement agreement is not between counsel for BONY and DeSelms. A simple reading of the settlement agreement attached as Exhibit 3 (Doc. No. 16-1) establishes that the Settlement Agreement was between DeSelms and Capital Management Services, L.P. Further, it is not Yu Mohandesi that is suing DeSelms, but rather BONY¹.

The second lawsuit filed in 2018 (*Marguerite DeSelms v. Bank of America, N.A. et al* (Case No. 18-00703), also before this Court, is an action brought by DeSelms against different defendants. DeSelms's argument that Bank of America should have brought these claims as a compulsory counterclaim is disingenuous at best. These are not Bank of America's claims, and as such, Bank of America has no basis to bring them as a counterclaim.

BONY is the rightful owner of the Promissory Note and DOT, and thus, it has standing to bring this lawsuit. DeSelms' MTD should be denied in its entirety.

II. WHETHER BONY HAS UNCLEAN HANDS IS NOT A MATTER THAT CAN BE DETERMINED ON A MOTION TO DISMISS

DeSelms argues that BONY "committed a series of violations of state law in executing and recording the assignments" and "committed violations of the fair debt collection practices act, imposing charge that were neither due nor owing." (MTD p. 13 ll. 6-11.) However, it is bedrock law that "[m]atters extraneous to the pleadings

¹ It should be noted that DeSelms has gratuitously disclosed a confidential settlement agreement which appears to be a breach of the Settlement Agreement. The Settlement Agreement specifically states "Plaintiff hereby agrees that she will not discuss or disclose, or cause to be discussed or disclosed, either orally or in writing, . . . the terms of this Settlement Agreement except as required by law, regulation, a duly served subpoena, or court order." None of those terms apply here, and the settling defendant may pursue DeSelms for breach of the Settlement Agreement terms.

1 should not be considered in the context of a motion to dismiss under Rule 12(b)(6),
 2 which...must depend on the allegations made within the four corners of the
 3 complaint.” *Alexander v. Kujok*, 158 F. Supp. 3d 1012, 1022 (E.D. Cal. 2016)
 4 (internal citations omitted). Plaintiff states that “[BONY] has failed to assert or prove
 5 any interest in the subject note and deed of trust.” (MTD pp. 12-13 ll. 27, 1.)

6 First, BONY has adequately pled the following facts to show it is the beneficial
 7 owner under the Promissory Note and DOT:

- 8 • “On September 14, 2011, all beneficial interest in the First Deed of Trust
 9 was assigned to BONY (the “BONY Assignment”).” (Complaint ¶ 21.)
- 10 • “The First Deed of Trust has not been subsequently transferred and
 11 BONY is currently the holder of the First Promissory Note and the
 12 beneficiary of the First Deed of Trust and entitled to all beneficial
 13 interests therein including the right to nonjudicial foreclosure of the
 14 Property.” (Complaint ¶ 22.)

15 Whether BONY has unclean hands is completely beside the point of a motion to
 16 dismiss. Issues of unclean hands have to be resolved at trial or on a motion for
 17 summary judgment, not a motion to dismiss. Accordingly, DeSelms’s MTD should
 18 be denied.

19 **III. CONCLUSION**

20 Based on the foregoing, BONY respectfully requests that this Court deny
 21 DeSelms’s MTD. Alternatively, if the Court finds merit in any of the arguments in
 22 the MTD, BONY respectfully requests that it be granted leave to file an amended
 23 complaint.

24 DATED: July 27, 2018.

25 YU MOHANDESI LLP

26
 27 By: /s/ Sheri Guerami
 28 Sheri Guerami
 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on July 27, 2018, a copy of the foregoing was filed and served electronically in the ECF system. Notice of this filing will be sent to the parties of record by operation of the Court's electronic filing system as described below. Parties may access this filing through the Court's system. A copy of the foregoing was also mailed via United States Postal Service to the following non-ECF participant:

Plaintiff Pro Per

Marguerite DeSelms

PO Box 84343

Los Angeles, CA 90073

DATED: July 27, 2018

/s/ Sheri Guerami
Sheri Guerami